IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation,
Plaintiff in Error,
vs.
INTERSTATE FAIR ASSOCIATION, a corporation,
Defendant in Error.

No. 4639.

UPON WRIT OF ERROR
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF WASHINGTON
NORTHERN DIVISION

PLAINTIFF'S

DEFENDANT IN ERROR'S BRIEF

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STATEMENT

This action was brought by Plaintiff in Error, Interstate Fair Association, against Plaintiff in Error, Fidelity and Deposit Company of Maryland, to recover the sum of $14,974.35 on an insurance policy. (Tr. 14.) There was a verdict and judgment for Defendant in Error in the sum of $15,211.54 (Tr. 26), from which judgment this Writ of Error is prosecuted.

The policy of insurance by its terms was effective from noon, August 31, 1924, for the period of ten days. (Tr. 18.) The loss claimed occurred on the night of September 4, 1924, through the abstraction of the money in question from the safe which was covered by the policy.

The question involved, on this writ of error, is whether the evidence brings the case within the protection of the policy, and certain instructions which Plaintiff in Error claims were erroneous.

The material portions of the policy are the following:

> "Fidelity and Deposit Company of Maryland does hereby agree with the assured, * * *
>
> 1. To indemnity the assured for all loss by burglary occasioned by the abstraction of any such property from the interior of any safe or vault described in the Declarations and located in the Assured's premises, by any person

or persons making felonious entry into such safe or vault *by actual force and violence, of which force and violence there shall be visible marks made upon such safe or vault by tools, explosives, chemicals or electricity.* * * *

4. This agreement shall apply only to loss or damage, *as aforesaid,* occurring within the policy period defined in Item 4 of this Declaration or within any extension thereof under Renewal Certificate issued by the Company.

THIS AGREEMENT IS SUBJECT TO THE FOLLOWING CONDITIONS: * * *

C. * * * nor shall the Company be liable for loss or damage if the assured, any associate in interest, or servant or employe of the Assured or any other person lawfully upon the premises, is implicated as principal or accessory in effecting, or attempting to effect, the burglary; nor unless all vault, safe and chest doors are properly closed and locked by combination or time lock at the time of the loss or damage; *nor if effected by opening the door of any vault, safe or chest by the use of a key or by the manipulation of any lock.* * * *"

By Item 4 of the Declarations, it is provided:

"The Policy Period shall be from August 31, 1924 until Sept. 10, 1924, at 12 o'clock noon, standard time at the location of the premises as to each of said dates." (Italics ours.)

The complaint alleged that on the night of September 4, or the morning of September 5, 1924, the safe was burglarized, by an entry being made into the safe, by actual force and violence, such force

and violence leaving visible marks to-wit: A drilled hole made by tools, explosives, chemicals or electricity. (Tr. 3.)

The answer denied the burglarious entry, and that it was made by actual force or violence, and denied that there were any visible marks made upon the safe by tools, explosives, chemicals or electricity. For an affirmative defense it was alleged that any entry, made to the safe for the purpose of taking the money, was effected by opening the safe by the use of a key or by the manipulation of the lock. (Tr. 7.)

Since we will fully discuss the material evidence in the argument, we will now make but a brief general statement as to the other facts.

Defendant in Error conducts a fair at Spokane in the early days of September of each year, the fair running for one week. On this occasion the fair opened September 1. (Tr. 70.) The safe in question was located in a vault. (Tr. 43, 57.) Entry was effected to this vault through a steel door which was locked by a combination lock. (Tr. 43.) Access to the vault door was obtained by passing through a steel sliding door, a wire caging surrounding the entrance to the vault. This wire caging is a part of the accounting room of the Fair Association (Tr. 43) and access thereto and likewise to the door of the vault can only be had through this accounting room. At the time of the alleged robbery, there was

no known way of obtaining access to the accounting room, except through the main offices, or through two side windows latticed with steel netting. (Tr. 59, 60, 66.) It is certain that the ones taking the money did not enter through these windows. (Tr. 60, 119.) A general diagram of the situation is shown by Exhibit 3. The main offices, of the Fair Association, are but a few feet away from the accounting room, with passages leading therefrom to the accounting room. In these main offices there was, during the night hours, various watchmen and others connected with the Fair continually. (Tr. 44, 61, 66, 67.) Defendant in Error, during fair week, maintained a police department, and one officer, connected with such department, was required to be constantly in the room maintained for that purpose (Tr. 47, 60, 66, 68) which was about 20 feet from the vault in a direct line, or about 40 feet following the regular line of travel. The auditor's room was, during the night time, brilliantly illuminated. (Tr. 66.)

According to the evidence, the last of the day's receipts were placed in the safe at about 10:20 o'clock on the evening of September 4, and were counted by the auditor and cashier and the safe door then closed and fully locked by the combination and the vault door was closed and auditor and cashier and the others connected with the accounting department then went home. (Tr. 40, 44, 46, 48.) The next morning, September 5th,

the vault door was found to be locked by the combination but upon opening same it was discovered that the safe door was open and the money was gone. At that time, no marks of any nature or kind of force, or violence, were found on the safe (Tr. 44, 49, 56), nor was there found any marks of force, or violence, explaining the means by which the vault door was opened. Later that day, it was found that a screw, connecting an arm that operated one of the bolts in the vault door, was missing, and there was some adhesive tape wrapped around one of the bolts of the vault door, and that the bolts of the vault door had been recently oiled. (Tr. 56, 59, 64, 77.) There was no explanation as to when these things were done, or whether they had any connection with the loss of the money, except that as to the oiling of the bolts, that usually anything of that sort would be ordered by the auditor and the work done by the caretaker; that the auditor had not ordered the bolts oiled and the caretaker had not oiled them. (Tr. 69, 70, 77.) The auditor, however, had on Tuesday, before the Fair opened, (6 days before the Fair opened) discovered the recent oiling of the bolts. (Tr. 70.) Two days after the loss of the money was discovered, there was found at one of the ends of the grandstand of the fair grounds a door, a part of which had been cut recently, by which it was claimed the ones taking the money got under the grandstand, and there was found in the board partition of the auditor's room a recently cut slide panel door by which it was thought entrance was effected to the

auditor's room. (Tr. 52, 59, 71, 72.) Although there were many of the fair officials, and employes, looking over the situation, and numerous police officers and detectives, investigating the loss, and trying to determine the facts at all times, and the fair officials, and detectives employed by Defendant in Error, were searching for some evidence that entrance was effected to the safe by actual force and violence, of which there were visible marks, so as to bring the loss within the protection of the policy, no marks of any nature or kind were found which it was claimed rendered the policy liable until the afternoon of September 24, 1924. (Tr. 44, 56, 60, 61, 65, 66.) On September 24, (19 days after the loss was discovered,) the auditor, the manager, an attorney and a safe expert went again to visit the premises, for the purpose of a final look over the situation, to see if visible marks of actual force or violence could be found. (Tr. 56, 57, 59, 65, 66.) When these four reached the fair ground, the attorney requested the safe expert to remove the combination of the safe. When this was done, the dial was removed and likewise the dial rim. (Tr. 56, 57.) The dial rim had to be picked off by the safe expert which indicated that it had been on for some considerable time. (Tr. 82, 90.) When the dial rim was removed a drilled hole was found under the dial rim, which dial rim concealed from the outside, the presence of the drilled hole, this drilled hole being one-fourth of the distance of the circumference to the right from zero. (Tr. 78, 82.) There was also discovered, at

the same time, quite a quantity of steel shavings lying on the platform on which the safe rested, and some were on the floor. (Tr. 58, 59, 61, 82.) We will show later that these steel shavings were not present on the morning when the loss was discovered. This drilled hole was 15-64ths of an inch in diameter. (Tr. 91.) The proof of claim presented was on the theory that entrance was effected to the safe by the drilling of this hole. The complaint was drawn on the same theory. (Tr. 3.) Defendant in Error's evidence was produced on the same theory until by cross examination, some of the fair officials had practically admitted that the hole was drilled prior to the loss at the direction of the Fair Association, (Tr. 62, 70, 78) whereupon Defendant in Error changed its theory and put on the stand one Elwood Larson, a safe expert, who testified that in the latter days of August, 1922, the Fair Association had lost the combination to the safe, and he was employed to open it and learn the combination. (Tr. 78.) That in doing this, he drilled this hole, necessarily ruining the dial rim in doing so; that he opened the safe, learned the combination, and then filled the drilled hole with a tapered steel plug driven fairly tight, (Tr. 78, 79, 95), put on a new dial rim to replace the ruined one, and reported the combination to the then manager, one Hannan, and two other men (Tr. 95, 96). No remains of this plug were found either in the combination chamber, or outside of the safe, (Tr. 87) and there was no evidence indicating that the tapered steel plug had ever been

drilled out, which would be manifest. (Tr. 86-88.) Upon putting the witness Larson on the stand Defendant in Error changed its theory, from a hole having been drilled by the ones who took the money, to the theory that the tapered steel plug, inserted in the hole, had been drilled out by such persons (Tr. 77-80), and still later changed its theory, upon it appearing that the plug could not have been drilled out, without leaving evidence of such fact, to the theory that the one taking the money had drilled a smaller hole into the plug and by this means had drawn the plug.

Plaintiff in error contended in the lower court, and still contends: (1) that there was no evidence of any felonious entry into the safe by any actual force or violence, or if that if there was any actual force or violence, there was no visible marks made upon such safe by tools, explosives, chemicals or electricity; (2) That the evidence conclusively established that any entrance to the safe was effected by the manipulation of the lock; (3) that the lower court committed error in refusing to give instructions requested and in the instructions given. That particularly it was error for the court to refuse to instruct the jury that the force and violence, if any, and the visible marks made, if any, must have been within the policy period, and it was error to instruct the jury in substance that, if the ones taking the money had prior to the policy period, through force or violence, obtained knowledge of the combination,

and then during the policy period had used such knowledge previously acquired to manipulate the combination, and open the safe and take the money, that that would create a liability under the policy.

SPECIFICATION OF ERRORS

1. The court erred in denying Plaintiff in Error's motion made at the time when the evidence was all in that the jury be instructed to return a verdict in favor of defendant. (Tr. 137-138.)

2. The court erred in refusing to give Plaintiff in Error's requested instruction 1 as follows:

> "I instruct you that under the evidence in this case defendant is not liable. And you will return a verdict in favor of said defendant."

3. The court erred in refusing to give Plaintiff in Error's requested instruction 4 as follows:

> "You are further instructed that if you should find by a preponderance of the evidence that the alleged burglar or burglars opened the door of the safe by the use of the manipulation of the combination lock on the safe, and in this manner was able to secure the money contained in the safe, that then your verdict should be in favor of defendant." (Tr. 154-155.)

4. The court erred in refusing to give Plaintiff in Error's requested instruction 5 as follows:

> "You are further instructed that if you should find that the alleged burglar or burglars

opened the safe door by the use of a key, or by the manipulation of the combination, your verdict should be in favor of defendant, even though you should find from the evidence that the alleged burglar or burglars obtained knowledge of the combination and how to manipulate it for the purpose of opening the door, through some fraud, or by the use of a hole made in the safe door by themselves or others." (Tr. 155.)

5. The court erred in refusing to give Plaintiff in Error's requested instruction 6 as follows:

"You are further instructed that unless you should find that a plug in the hole in the safe door under the rim adjoining the dial was removed by the alleged burglar or burglars, your verdict in this action must be for the defendant." (Tr. 155.)

6. The court erred in refusing to give Plaintiff in Error's requested instruction 7 as follows:

"You are instructed further that the policy of insurance on which plaintiff sues was effective commencing with noon on August 31, 1924, and up to and including September 10, 1924, at 12 o'clock noon. If you should find from the evidence that the alleged burglar or burglars removed a plug from the hole under the rim, and by means of said hole they were able to and did open the door of the safe, nevertheless, I instruct you to entirely disregard the existence of such hole, or the removal of any plug therefrom, unless you shall find by a preponderance of the evidence that said hole was bored by the burglar or burglars, or the plug was removed by such burglar or burglars between noon on August 31, 1924 and the time

of the discovery by the Fair Association that the safe had been opened, and the money taken." (Tr. 155-156.)

7. The court erred in refusing to give Plaintiff in Error's requested instruction 8 as follows:

> "You are further instructed that if any act or thing was done by the alleged burglar or burglars prior to noon, August 31, 1924, the date when the said policy became effective, for the purpose of burglarizing said safe, that no liability would attach, under the policy, for such act previously done, nor can you consider any such act for the purpose of creating or fixing a liability under the policy." (Tr. 156.)

8. The court erred in instructing the jury as follows:

> "I charge you that if you find from a preponderance of the evidence that some years previously to the entry into the safe referred to in the complaint a man employed by the plaintiff had drilled a hole in the door of the safe for the purpose of effecting an entry into it, and that after effecting such entry the hole was closed by a steel plug driven into it, and if you further find from such preponderance of the evidence that at the time, or previous to the time, of the entry referred to in the complaint the person or persons effecting such entry did so by drilling or of drawing out with tools the plug which had been previously driven into the hole in the safe door, and were thereby enabled to effect an entrance into the safe, then the drilling or drawing out of such plug with tools was the use of actual force and violence within the terms of the policy, and the hole left in the safe door by

reason of such drilling or drawing out of such plug was visible mark of force and violence made upon such safe within the terms and meaning of the policy." (Tr. 156-157.)

9. The court erred in instructing the jury as follows:

"As I have already said, the policy in suit covered the period from noon of August 31, 1924, to noon of September 10, 1924. The defendant cannot be held liable upon such policy unless the money which was taken from the safe, as referred to in the complaint, was abstracted from the safe during that period. However, if you find from a preponderance of the evidence that the money was taken from the safe during that period, under such circumstances as would render the defendant liable upon its policy, as these have heretofore been defined to you, then defendant is liable for the loss of the plaintiff caused thereby, although you should further find that the person or persons who effected the entrance into the safe and took the money therefrom during the policy period had previously to its commencement removed the plug from the hole in the safe door by drilling or drawing it out with tools, and thereby acquired a knowledge of the working of the combination by means of which they were subsequently and during the policy period able to effect an entrance into the safe and extract therefrom its contents." (Tr. 157-158.)

10. The court erred in instructing the jury as follows:

"If you find from a preponderance of the evidence that the person or persons who effected an entrance into the safe and took the money

therefrom as described in the pleadings and evidence, did so by drilling or drawing out the plug in the safe door with tools, leaving a hole in the safe door by means of which such person or persons were enabled to gain a knowledge of the working of the combination, and so to work the combination and open the safe door and take the money from the safe, then I charge you that defendant is not relieved from liability because of the final act of entering the safe was effected by working the combination on the safe door. If such person or persons were enabled to gain a knowledge of the manner of working the combination by means of drilling or drawing out the plug in the safe door, and the person or persons so drilling or drawing out such plug thus obtained access to the combination and thereby were enabled to effect an entrance into the safe, the defendant is liable, if you find the other circumstances present which I have stated to you to be necessary to sustain its liability." (Tr. 158-159.)

11. The court erred in overruling Plaintiff in Error's motion for a new trial. (Tr. 159.)

12. The court erred in entering judgment in favor of Defendant in Error and against Plaintiff in Error. (Tr. 26.)

BRIEF OF ARGUMENT

1. Plaintiff in Error was entitled to a directed judgment for the following reasons:

(a) There was no testimony that entrance to the safe was effected by actual force and violence,

nor that there were any visible marks made upon said safe by tools, explosives, chemicals or electricity, by the one taking the money.

(b) In the absence of evidence to the contrary, it is presumed that an act has been rightfully done, and was not of a wrongful nature.

Alexander v. Fidelity Trust Co.,
249 Fed. (3rd Cir.) 1;

American Surety Co. v. Citizens National Bank, 294 Fed. (8th Cir.) 609;

Succession of Drysdale,
50 So. (La.) 30;

McLaughlin v. Bardsen,
145 Pac. (Mont.) 954;

U. S. Fidelity & Guaranty Co. v. Bank of Batesville, 112 S. W. (Ark.) 957;

City of Maysville v. Truex,
139 S. W. (Mo.) 390;

Capp v. City of St. Louis,
158 S. W. (Mo.) 616;

Nomath Steel Company v. Kansas City Gas Co., 223 S. W. (Mo.) 975;

Fried v. Olson,
133 N. W. (N. D.) 1041;

Lopez v. Rowe,
57 N. E. (N. Y.) 501, 503.

(c) There were no circumstances proven, which would legally permit an inference to be drawn, that entrance was effected, by actual force and violence, nor that there were any visible marks made upon such safe by the one so entering.

Manning v. John Hancock Mutual Life Ins. Co., 10 Otto 693; (25 L. Ed. 761);

Patton v. Texas & Pacific Railway Co., 179 U. S. 361; (45 L. Ed. 361);

Cunard S. S. Co. v. Kelley, 126 Fed. (1st Cir.) 610;

U. S. Fidelity and Guaranty Co. v. Des Moines Na't Bk., 145 Fed. 273;

U. S. v. American Surety Co., 161 Fed. (D. C.) 149;

Parmelee v. C. M. & St. P. Ry. Co., 92 Wash. 185 (158 Pac. 977);

Klumb v. Iowa State Traveling Men's Association, 120 N. W. (Ia.) 81;

Lopez v. Rowe, 57 N. E. (N. Y.) 501, 503;

Tibbits v. Mason City and Ft. D. R. Co., 115 N. W. (Ia.) 1021;

Shaw v. New Year Gold Mines Co., 77 Pac. (Mont.) 515;

Monson v. LaFrance Copper Co., 101 Pac. (Mont.) 243;

Chicago R. I. & P. Ry. Co. v. Rhoades,
68 Pac. (Kan.) 58;

In re Wallace Estate,
220 Pac. (Cal.) 682;

Albert v. McKay & Co.,
200 Pac. (Cal.) 83;

Ohio Building Safety Vault Co. v. Industrial Board, 115 N. E. (Ill.) 149;

Ohlson v. Sac County Farmers Mutual Fire Assurance Association, 182 N. W. (Ia.) 879;

Carr v. Donnet Steel Co.,
201 N. Y. Supp. 604;

Ford v. McAdoo,
131 N. E. (N. Y.) 874;

Spickelmier Fuel & Supply Co. v. Thomas,
144 N. E. (Ind.) 566;

St. Louis and S. F. R. Co. v. Model Laundry, 141 Pac. (Okla.) 970;

Spoon v. Sheldon,
151 Pac. (Cal.) 150;

Southern Ry. Co. v. Dickson,
100 So. (Ala.) 665;

Riley v. City of New Orleans,
92 So. (La.) 316;

Coolidge v. Worumbo Manufacturing Co.,
102 Atl. (Me.) 238.

(d) To establish the facts necessary for a recovery, inference must be drawn from inference. The inference must be drawn that the robber removed the steel plug; that having removed the steel plug, he, then, through the drilled hole, manipulated the combination so as to open the door, and in that manner learned the combination; that otherwise he was without knowledge of the combination, and, at the time he entered the safe for the purpose of taking the money, he was able to manipulate the combination, due to what he had learned through the drilled hole. Inference cannot be based on another inference.

United States v. Ross,
92 U. S. 281 (23 L. Ed. 707);

Manning v. John Hancock Mutual Life Ins. Co., 10 Otto, 693 (25 L. Ed. 761);

Loone v. Metropolitan Railway Co.,
200 U. S. 480, (50 L. Ed. 564);

Smith v. Pennsylvania Railroad Co.,
239 Fed. (2nd Cir.) 103.

(e) There were no visible marks of tools, explosives, chemicals or electricity. (1) If there were any marks, they were on the steel plug, or it was the absence of the steel plug, which was not covered by the policy. (2) Under the policy the part of the outer door covered was limited to the "solid steel" exclusive of "bolt work." (3) A material misrepresentation of the condition of the door was

made in obtaining the policy, in that the outer steel door was not solid steel, and would not afford the resistance contemlpated.

(f) The entrance, by the robber to the safe, was effected by the manipulation of the combination and, therefore, the loss was not covered by the policy. The following are cases dealing with somewhat similar conditions:

New Amsterdam Casualty Co. v. Iowa State Bank, 277 Fed. (8th Cir.) 713;

Franklin State Bank v. Maryland Casualty Co., 256 Fed. (5th Cir.) 356;

First Na'tl Bank of Monrovia v. Maryland Casualty Co., 28 Am. & E. Ann. Cases, 1913-C, 1176 and notes, (121 Pac. 321);

Fidelity & Deposit Co. v. Panitz, 120 Atl. (Md.) 713;

Van Kuren v. Travelers Ins. Co., 108 S. E. (Ga.) 310;

Nahigan v. Fidelity & Casualty Co., 253 S. W. (Mo.) 83;

Frankel v. Mass. Bonding & Ins. Co., 177 S. W. (Mo.) 775;

Maryland Casualty Co. v. Ballard County Bank, 120 S. W. (Ky.) 301;

Blank v. National Surety Co., 165 N. W. (Ia.) 46;

Rosenthal v. Amer. Bonding Co.,
46 L. R. A. (N. S.) 561 and cases cited;

Feinstein v. Mass. Bonding & Ins. Co.,
183 N. Y. Supp. 785;

United Springs Co. v. Preferred Accident Ins. Co., 161 N. Y. Supp. 309.

(g) If there was any force or violence, or any visible marks of tools, explosives, chemicals or electricity, it was at a time prior to the policy period, and not within the protection of the policy.

(h) The steel shavings found on the platform on which the safe rested, on Sept. 24, 1924, had no connection with the robbery; they were not present on the morning following the robbery.

(4) The District Court, improperly construed the policy, so as to permit a recovery where there was no force or violence, nor visible marks made, within the policy period. The insurance was for the limited period of ten days subsequent to August 31, 1924, noon, and if the alleged burglary was occasioned by felonious entry, by actual force and violence, such force and violence and visible marks made upon the safe by tools, explosives, chemicals or electricity, all was prior to the policy period. All of the necessary elements to constitute the burglary as defined were essential and must have occurred within the policy period.

32 C. J. p. 1148 Sec. 258,
9 C. J. p. 1096;

Northern Assurance Co. v. Grand View Bldg. Assn., 183 U. S. 308, 332 (46 L. Ed. 213);

Kentucky Vermillion L. & C. Co. v. Norwich U. F. Ins. Soc., 146 Fed. (9th Cir.) 695;

Bench Canal Drainage District v. Maryland Casualty Co., 278 Fed. (8th Cir.) 67, 80;

Gilchrist Transp. Co. v. Phoenix Ins. Co., 170 Fed. (6th Cir.) 279, 281;

Frankel v. Mass. Bonding & Insurance Co., 177 S. W. (Mo.) 775;

Rosenthal v. American Bonding Co., 46 L. R. A. (N. S.) 561;

Hartford Fire Insurance Co. v. Wimbish, 78 S. E. (Ga.) 265;

Stich v. Fidelity & Deposit Co., 159 N. Y. Supp. 712;

Stuht v. Maryland Motor Car Ins. Co., 90 Wash. 576 (156 Pac. 557);

Bank of Monrovia v. Maryland Casualty Co., 28 Am. E. Ann. Cases, 113-C, p. 1176 and notes.

Blank v. National Surety Co., 165 N. W. (Ia.) 46.

(5) Error was committed in refusing to instruct the jury that there could be no recovery if entrance was effected by the manipulation of the combination lock. In any event, it was error to instruct the jury that entry by the manipulation of the combination lock would only defeat a recovery where "actual force and violence" was not employed.

(6) Error was committed in refusing to instruct the jury that there could be no recovery unless the robber removed the tapered steel plug. If there could be on any theory a recovery, it would have to be based upon the removal of this plug and the jury should have been so instructed.

(7) Error of the court in denying the petition for a new trial and in entering judgment.

ARGUMENT
UNDER THE PLEADING AND EVIDENCE PLAINTIF IN ERROR WAS ENTITLED TO A DIRECTED JUDGMENT

Specifications of Error I and II

Even, if the District Court's construction of the policy of insurance, as shown by its instructions and its refusal to instruct, which specifications of error will be discussed later, should be sustained, nevertheless Plaintiff in Error submits that the evi-

dence did not warrant the submission of this case to the jury, and Plaintiff in Error was entitled to an instructed verdict.

There was no evidence that the money was taken from the safe by anyone through making a felonous entry into such safe by actual force and violence, nor was there any evidence that there were any visible marks made upon such safe by tools, explosives, chemicals or electricity by the ones taking the money. Nor was there any evidence from which the jury could draw an inference that entrance to the safe was effected in that manner. In fact, if the evidence was such as to permit any inference whatever to be drawn on the subject, it was an inference that the entrance was not effected in the manner necessary to bring the loss within the protection of the policy, and there were no visible marks of a violent entry. If our position in this regard is correct, then the verdict in favor of Defendant in Error could only be the result of speculation and guess.

We believe, the whole basis for any contrary contention, which defendant in error might make, is this: That when Elwood Larson, the safe expert, at the request of Defendant in Error, in the latter days of August, 1922, drilled the hole in the safe door, for the purpose of opening the safe, he put into the hole a tapered steel plug driven in fairly tight (Tr. 79, 95); that on the afternoon of September 24, 1924 (19 days after the loss of the money

was discovered) the tapered steel plug was no longer in the hole. There is no evidence bearing upon the removal of this plug from the hole; there is no evidence that the plug was in the hole at any particular time between the day in August, 1922, when Larson placed it there, and September 24, 1924; nor is there any evidence creating any basis for an inference that the plug was in the hole at any time shortly before the night of September 4, when it is claimed the money was taken, nor that the plug was not in the hole on the morning of September 5, when the loss of the money was discovered. The record is entirely silent on these points, there being present nothing of any evidentiary nature favorable to Defendant in Error, except that the money disappeared on the night of September 4, and the further fact that the plug was in the hole on the last days of August, 1922, and was not in the hole on the afternoon of September 24, 1924. If we are correct in our above statement as to the condition of the record, there is here no circumstantial evidence from which an inference might be drawn, that the ones taking the money gained knowledge of the combination by removing the plug, and were thus enabled to open the safe.

In making the above statements, we have not overlooked the drill mark on the carrier tumbler, which was greatly relied upon by Defendant in Error in the early part of the trial. (Tr. 81, 83), which drill mark Larson testified, on cross examina-

tion, was probably made by him (Tr. 96) and which drill mark Defendant in Error's expert witness Corey admitted, on cross examination, could not have been made by anyone who was drilling, or attempting to drill, out the plug (Tr. 97) and which drill mark the District Court withdrew from the consideration of the jury, so far as there was any claim that it constituted a visible mark of force or violence. (Tr. 145.)

Nor are we overlooking the fact that on the afternoon of September 24, when it is claimed this drilled hole was discovered by the Fair Association, (the Fair Association, of course, had known of the hole ever since Larson had drilled it in August, 1922),) there was a quantity of steel shavings on the platform on which the safe stood, and on the floor below. If these steel shavings could have been of any importance, under any theory, as forming any basis for an inference that entrance to the safe by the ones taking the money was effected through this drilled hole, which we think they could not, nevertheless there was no evidence that these shavings were present on the morning of September 5, when the loss of the money was discovered, and it is quite conclusively established that they were not then present. If they were not present, immediately following the time when the money was taken, then it is manifest that the steel shavings have no important bearing. The evidence dealing with the steel shavings will be considered more at length hereafter.

What we have said above is directed solely to any evidence of a circumstantial nature, or rather evidence on which it might be claimed the jury were entitled to draw the inference, that entrance was effected to the safe, by the ones taking the money, through the drilled hole. There was, however, other evidence which would compel the inference, if any inference at all could be legally drawn, that the drilled hole played no part whatsoever in the loss of the money, and which compels the inference that entrance was effected to the safe by the ordinary method, namely, the manipulation of the combination alone, and such other evidence will be now considered.

NO EVIDENCE OF FORCE OR VIOLENCE NOR OF VISIBLE MARKS

The discovery on September 7, 1924, of the door cut in the grandstand, and the door cut in the partition of the auditor's office, (Tr. 52, 59, 71, 72,) we think plays no part in determining the question as to whether force, or violence, was used in entering the safe, and whether there were any visible marks on the safe of force and violence. They have some bearing upon whether, if there was force or violence, such force or violence was within the policy period, and this feature will be considered more fully later. Nor do such entrances to the grandstand, and to the auditor's office, even tend to prove that the money

was taken by some one other than people connected in some manner with Defendant in Error. Whether the money was taken by professional yeggmen, or by some one connected with the Fair Association, in either situation, a means of ingress and egress similar to these doors was absolutely essential. A number of employes of the Fair Association were at all times in a nearby room, near which anyone going to, or from, the vault where the safe was located, would be required to pass. Without such a method, as devised, the ones who would be carrying out the money would be compelled to pass through the brilliantly lighted auditor's room (Tr. 66) and through the open spaces, which would render it nearly impossible for them to escape detection. There were seven sacks of silver, each sack containing $500, and considerable additional loose silver. This alone would necessitate several trips to and from the vault. No matter who it was that planned to take the money, a method of getting into and from the vault without detection had to be devised. There is a reason why it is scarcely conceivable, that the money was taken by anyone other than some one, who knew what was transpiring in the auditor's room, unless there was a confederate who was kept informed as to what was taking place in the auditor's room. The construction of this door, under the grandstand, was something that might have attracted attention before the money was taken. The construction, of the door into the auditor's room, was a change which would probably be quickly discovered by the Fair Association,

particularly the placing the 2x4 on the inside of the auditor's room, which concealed the sawed boards, (Tr. 64) was a general change, which it might be expected, would be noticed. Especially where one is contemplating a crime, they would be very apprehensive on the subject. The removal of the screw which connected one of the arms to one of the bolts in the vault door, the placing of adhesive tape around one of these bolts, and the fresh oiling of the bolts of the vault door, all of which was perfectly open to sight, would probably be quickly discovered. In fact the auditor, Mr. Reinhard, did on Tuesday, before the Fair opened, discover the fact that these bolts had been freshly oiled. (Tr. 70.) It is scarcely conceivable that a professional, or any burglar, having prepared this situation, would have passed through this hole in the grandstand, this hole in the partition of the auditor's room and into the vault, had he not known that none of these things had been discovered by the Fair Association. He would know, that if any of these things were discovered, the Fair Association would realize at once that a robbery was planned, and that officers would be lying in wait for the purpose of trapping him. He would know that, if any of these things had been discovered, and, he should enter the auditor's office, he would certainly be captured and there would be no possibility of making an escape. Therefore we say, it is inconceivable, that, if the one who took the money, entered the auditor's office, passing through these two doors, he did so without knowing that none of these things

had been discovered. Therefore, he must have been some one closely enough connected with the auditor's office, so as to be advised as to what was known by the ones in that office, or he must have had a confederate who was so advised.

The only evidence, in the record which would tend to create any inference whatsoever, as to whether the ones taking the money obtained access to the safe, by drawing out the tapered steel plug from the drilled hole, is unfavorable to Defendant in Error's contention.

In the first place, so far as the record discloses, there was no occasion for the one taking the money to gain a knowledge of the combination through the drilled hole. The combination to the safe was known by the president, Mr. Griffith, the manager, Mr. Semple, the auditor, Mr. Reinhardt, a former manager, Mr. Hannan, and Mr. Nettleton. (Tr. 69.) It was also known by Elwood Larson, who learned the combination in August, 1922, and communicated it to Mr. Hannan and two other persons. (Tr. 96.) Who these other two persons were, the record does not disclose. None of the persons testified that they had not communicated the combination to others. The combination might be obtained by one desiring so to do in a number of ways without using force or violence on the safe. Mr. Reinhardt had the combination numbers on a card, or in a pocket memorandum book, which he always carried in his pocket

(Tr. 70), and which apparently had been lost before the time Elwood Larson was employed to open the safe. It would have been a perfectly easy matter for one desiring so to do to have taken this card, or book from Mr. Reinhardt's pocket, learned the combination, and returned the same to the place from which it was obtained, or possibly failed to return it, with the result that Larson had to be called upon to open the safe. It is entirely possible that, if the card or book in which the combination was kept was lost, that robbers found it and thus learned the combination. When Larson had opened the safe he left the door open while he went back to town to get a new dial rim and the tapered steel plug (Tr. 95.) With the safe door open it would be an easy matter for one to learn the combination in a few minutes. (Tr. 89.) One could learn the combination by watching another open the safe while standing a few feet distant. Larson was not certain but that he left the safe unlocked when he left finally, (Tr. 95.)

That the door was opened at the time the money was taken by the manipulation of the combination cannot well be doubted. The only theory of Defendant in Error is, that, the one so opening the door, by the use of the combination, had acquired knowledge of the combination, through this drilled hole; and yet there is not, as we read the record, the slightest thing on which to base any such inference.

The combination could be obtained, although

probably requiring a long time by experimenting with and manipulating the combination knob. (Tr. 99, 100.)

Except during fair week, and for a short time prior thereto, the fair grounds are very nearly deserted. (Tr. 68.) There was, therefore, an opportunity for anyone contemplating robbing the safe to make the preparations necessary for that purpose. During fair week, and for a number of days prior thereto, there were many people around the grounds, which would render it difficult, if not impossible, to then make this preparation. (Tr. 68.) The preparations, in making these doors to the grandstand and auditor's office, opening the vault door, and working with the bolts on the inside of the vault door, required considerable time, and this could not well have been done during fair time, or for a considerable number of days before that without discovery. Therefore there was no occasion to remove this steel plug, if it was still in the safe. That this preliminary work was done, before the fair opened, is established by direct evidence, in that Mr. Reinhardt discovered, that, the mechanism of the vault door had been oiled recently, the Tuesday before the fair opened. (Tr. 70.)

That it was not necessary, for the ones committing the crime to use force and violence, is established by the direct evidence, introduced by Defendant in Error. The vault door was locked by a com-

bination lock. (Tr. 44, 46, 48.) This vault door was closed and the combination completely thrown at the time the auditor's office force left on the night of September 4, 1924 (Tr. 46.) The vault door was found locked on the morning of September 5, 1924, when Mr. Reinhardt arrived. (Tr. 48.) There were no marks, of any nature or kind on the vault door, explaining how the door was opened, and entrance to the vault could only have been made by the ordinary manipulation of the combination. (Tr. 49, 56.) Notwithstanding, the ones who robbed the safe, knew the combination to the vault door, and did not have to resort to force or violence in learning such combination, yet Defendant in Error asks, that, the jury should be permitted to infer that the robber did not learn the combination to the safe door, except through force and violence. That the safe door was opened, at the time the robbery was committed, was established by the direct evidence, that when Mr. Reinhardt opened the vault on the morning of September 5, 1924, the safe door was then open and the bolts thrown in the way they should be when the combination had been probably used. (Tr. 47.)

Other facts, strongly indicating that no force or violence was used in acquiring the combination to the safe by the robbers are the following: This drilled hole is under the dial rim (Tr. 95); the presence of such drilled hole could only be known by removing the dial rim or by turning it back with a pair of pliers. (Tr. 95.) The dial rim could not be re-

moved without opening the door removing the combination and the combination knob. After so doing the screws holding the dial rim would be exposed and the dial rim could then be removed. (Tr. 80, 82.) It is, of course, true that if this was done, then the robber effected entrance to the safe, before he could have any knowledge of the existence of the drilled hole. If the robber attempted to drill a hole for the purpose of picking the combination, there was no occasion for him drilling such hole where it would touch the dial rim at all. The quickest and best way was to drill the hole directly, and just above, the dial rim. (Tr. 79.) The only objection to this method was that it would mar the safe more and could not be as well covered up. (Tr. 95.) The robber, however, was not interested in this. There was no effort to conceal the fact that entrance had been effected to the safe and everything of value therein taken.

The only answer to this is that the preliminary plans to get into the safe were made at a prior date, and before the fair opened and before the policy period. Therefore, assuming that the robber did any work preparatory to the robbery, before the fair opened, we are confronted with this situation: He knew nothing about the existence of the already drilled hole, nor the presence of a plug, if there was a plug. He drills through the dial rim, and to the steel underneath, and leaves not the slightest mark upon the steel door underneath. These facts could

not exist, unless he exactly centered the plug underneath. He could not know that a hole had been previously drilled and filled with a plug without making a careful examination through the hole which he would drill in the dial rim and that such an examination would be made is very improbable. The natural thing to do, if it was necessary for him to get a start for his drill, when it struck the steel of the safe door, was to make the necessary indentation without attempting to examine the nature of the plate which he intended to drill through.

Defendant in Error's expert admitted that the exterior, where this drilled hole appeared, did not show any evidence that a second drilling had occurred (Tr. 86, 87, 88); that the tapered steel plug could not be drilled out with the same sized drill without leaving evidence of such fact on the outside (Tr. 88), and that evidence of the use of the second drill would be found on the walls of the hole, (Tr. 87) and that when the drill had entered a short distance the plug would begin to turn and would then have to be pushed in (Tr. 86, 96) and that the remains of the plug would interfere with the manipulating of the combination or getting knowledge of the combination through the hole. (Tr. 93.) That the only way in which access could be obtained to the combination through this hole, if it was plugged, was by drilling into the plug with a smaller drill and then pulling the plug out. (Tr. 86.) Otherwise evidence of the second drilling would be present. (Tr.

87, 88.) From this it follows that the robber had to go prepared with two sized drills, one in contemplation of drilling a hole through, and a smaller drill in contemplation that he would find a plug there which he would have to draw. That after drilling through the dial rim, he examined the surface of the safe through this hole, for the purpose of discovering what the conditions were, (all of which was unnecessary) and having done so, discovered that a hole had already been drilled, and plugged, and he thereupon proceeded to perform his purpose in such a way so as to leave no evidence of the drilling. That this robber then proceeded to obtain a new dial rim since the old one necessarily was ruined. He removes the combination, dial knob and old dial rim, puts on a new dial rim, and replaces the combination, all of which was unnecessary if he was to obtain entrance in a forcible manner to the safe. All that he needed to do, if force was necessary, was to take his drill with him the night of the robbery and after having gotten into the vault, drill his hole at the top, the easiest and quickest place, open the safe, get the money and go.

Another fact, which tends to negative that the plug was removed by the robber, is that some one for some purpose, after the money was taken, and before the drilled hole was discovered, (?) scattered steel shavings on the platform on which the safe rested. By whom this was done, and the purpose of the act, is not disclosed by the record. It apparently was in-

tended to create the impression, that, these steel shavings had some connection with the drilled hole. It is possible, that the one who took the money, finding that suspicion was directed toward some one connected with the Fair Association, sought to create evidence to indicate that it was an outside job.

If this tapered steel plug was removed, by the one who intended to rob the safe, such person was committing a crime in so doing. If it was removed by some one who had authority so to do, a crime was not committed. In the absence of evidence to the contrary, it is presumed that an act has been rightfully done, and that the act was not of a wrongful nature. There is always a presumption against crime or wrong.

Alexander v. Fidelity Trust Co.,
249 Fed. (3rd Cir.) 1;

American Surety Co. v. Citizens National Bank, 294 Fed. (8th Cir.) 609;

Succession of Drysdale,
50 So. (La.) 30;

McLaughlin v. Bardsen,
145 Pac. (Mont.) 954;

U. S. Fidelity & Guaranty Co. v. Bank of Batesville, 112 S. W. (Ark.) 957;

City of Maysville v. Truex,
139 S. W. (Mo.) 390;

Capp v. City of St. Louis,
158 S. W. (Mo.) 616;

Nomath Steel Company v. Kansas City Gas Co., 223 S. W. (Mo.) 975;

Fried v. Olson,
133 N. W. (N. D.) 1041;

Lopez v. Rowe,
57 N. E. (N. Y.) 501, 503.

In the above cases the principle has been applied under various circumstances and conditions. Thus in the Alexander case the syllabus is "where the act of a party may refer indifferently to one or two motives, the law prefers to refer it to that which is honest rather than to that which is dishonest."

In the American Surety Company case the syllabus is "until there be reasonable ground to think otherwise, a presumption prevails that one acts honestly and keeps within the requirements of the law."

There is some difference, in the decision from the various courts, as to what is necessary in order that a court, or jury, may draw an inference which is necessary for the purpose of sustaining a judgment. The test has been stated: (1) Inferred fact must have an immediate connection with, or relation to, the established fact; (2) Where one of several inferences may be reasonably drawn, jury may not speculate which to accept; (3) Inference sought to be drawn must be established to exclusion

of any other. It must be the only theory or conclusion which may be fairly, or reasonably drawn; (4) Where an inference may be drawn equally consistent with non-liability, as with liability, the evidence tends to prove neither; (5) The facts from which the inference is sought to be drawn, must be inconsistent with any other rational conclusion; (6) Conclusion must be the only one which can be fairly or reasonably drawn; (7) The facts from which the inference is sought to be drawn must exclude any other hypothesis, and possibility is not sufficient.

It is not necessary to segregate the different decisions, since the facts in this case do not bring it within any rule announced, by which the jury would be permitted to say, as an inference from the other facts proven, that this tapered steel plug was removed by the burglar, and in that manner he obtained the combination. It could not be found in this case that the robber removed this steel plug, nor that he obtained knowledge of the combination through the removal of the steel plug, except as the result of pure guess and speculation. There is nothing to it but guess and speculation and a poor guess at that. All cases agree that there must be evidence establishing the material facts, either direct or circumstantial, and that such facts cannot be established through guess and speculation. The mere possibility that the facts exist is not sufficient.

Manning v. John Hancock Mutual Life Ins. Co., 10 Otto 693; (25 L. Ed. 761);

Patton v. Texas & Pacific Railway Co.,
179 U. S. 361; (45 L. Ed. 361);

Cunard S. S. Co. v. Kelley,
126 Fed. (1st Cir.) 610);

U. S. Fidelity and Guaranty Co. v. Des Moines Nat'l Bk., 145 Fed. 273;

U. S. v. American Surety Co.,
161 Fed. (D. C.) 149;

Parmelee v. C. M. & St. P. Ry Co.,
92 Wash. 185 (158 Pac. 977);

Klumb v. Iowa State Traveling Men's Association, 120 N. W. (Ia.) 81;

Lopez v. Rowe,
57 N. E. (N. Y.) 501, 503;

Tibbits v. Mason City and Ft. D. R. Co.,
115 N. W. (Ia.) 1021;

Shaw v. New Year Gold Mines Co.,
77 Pac. (Mont.) 515;

Monson v. LaFrance Copper Co.,
101 Pac. (Mont.) 243;

Chicago R. I. & P. Ry. Co. v. Rhoades,
68 Pac. (Kan.) 58;

In re Wallace Estate,
220 Pac. (Cal.) 682;

Albert v. McKay & Co.,
200 Pac. (Cal.) 83;

Ohio Building Safety Vault Co. v. Industrial Board, 115 N. E. (Ill.) 149;

Ohlson v. Sac. County Farmers Mutual Fire Assurance Association, 182 N. W. (Ia.) 879;

Carr v. Donnet Steel Co., 201 N. Y. Supp. 604;

Ford v. McAdoo, 131 N. E. (N. Y.) 874;

Spickelmier Fuel & Supply Co. v. Thomas, 144 N. E. (Ind.) 566;

St. Louis and S. F. R. Co. v. Model Laundry, 141 Pac. (Okla.) 970;

Spoon v. Sheldon, 151 Pac. (Cal.) 150;

Southern Railway Co. v. Dickson, 100 So. (Ala.) 665;

Riley v. City of New Orleans, 92 So. (La.) 316;

Coolidge v. Worumbo Manufacturing Co., 102 Atl. (Me.) 238.

There are many other cases which we might cite, where the same principles have been discussed, as in the cases cited above, but we have confined ourselves to a few.

In the Manning case it is said:

"We do not question that a jury may be allowed to presume the existence of a fact in some cases from the existence of other facts which have been proved. But the presumed fact must have an immediate connection with, or rela-

tion to, the established fact from which it is inferred. If it has not, it is regarded as too remote."

In the Patton case it is said:

"That in the latter case it is not sufficient for the employe to show that the employer may have been guilty of negligence, the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that anyone of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion."

United States Fidelity & Guaranty Co. v. Des Moines National Bank, *supra*, is a very well considered case, and discusses the question at considerable length. It is said:

" Passing for the moment the fact that Kelley neglected to make a daily count of the money in the reserve chest, it is plain that the evidence bearing upon the cause or occasion of the loss was altogether circumstantial, and was as consistent with the theory that the loss was occasioned solely by the personal dishonesty of one of the other employes to whom the money in its exposed condition was easily accessible as with the theory that it was occasioned by the personal dishonesty or culpable negligence of Kelley. Which theory was correct was left to conjecture. The bank had the burden of proof, and, as it failed to produce any evidence reason-

> ably tending to establish the latter theory to the exclusion of the other, the Guaranty Company was entitled to a directed verdict in its favor."

Proceeding further, and after citing a number of cases, the court quotes with approval from Ashback v. Chicago, etc. Ry. Co., 37 N. W. 182, as follows:

> "A theory cannot be said to be established by circumstantial evidence, even in a civil action, unless the facts relied upon are of such a nature, and are so related to each other, that it is the only conclusion that can fairly or reasonably be drawn from them. It is not sufficient that they be consistent, merely, with that theory for that may be true and yet they may have no tendency to prove the theory."

In United States v. American Surety Company, *supra*, it is said:

> "In meeting the burden of proof in this case it is not enough for plaintiff to show that the wrong complained of might have been occasioned by the default of Hammel, that he was pilfering from the mails and had the opportunity to take the things of value contained in the 120 letters. When the plaintiff produces evidence that is consistent with an hypothesis that the defendant is not liable and also with one that it is, his evidence tends to establish neither."

The last mentioned case went to the Circuit Court of Appeals (163 Fed. 228). This part of the decision of the lower court was affirmed but the case was reversed on other grounds.

In the Parmelee case this question has been carefully considered. Many decisions from both the Washington Supreme Court and other courts are discussed. The court says:

> "It is just as possible that deceased came to his death by some cause other than the negligence of the respondent as that he came to his death through such negligence. Possibility cannot be pyramided on possibility to make a chain of evidentiary circumstances. It is not a possible theory, but inferences from facts reasonably ascertained which impels. It is that conclusion to which the mind will inevitably return when it weighs the circumstances for either side, and will say, not arbitrarily, but as a result of due deliberation and a measuring of all the facts, that the proximate cause of the incident is to be found in the negligent conduct of the party charged. This is but another statement of the primary rule of circumstantial evidence; that is, that not only should the circumstances all concur to show that the thing charged happened in a particular way, but that they are inconsistent with any other rational conclusion."

In the Klumb case it is said:

> "It is a general rule in determining whether the circumstances relied upon furnished any evidence whatever of the conclusion sought to be drawn therefrom that the facts which the evidence tends to establish must be of such nature and so related to each other that the conclusion is the only one that can fairly or reasonably be so drawn. It is not sufficient that they are consistent with such conclusion if they are equally consistent with some other conclusion."

The New York Court of Appeals and Supreme Court of New York, have passed upon similar questions many times and have always been consistent in their decisions. We have cited but two. In the Lopez case it is said:

> "While a material fact may be established by circumstantial evidence, still to do so, the circumstances must be such as to fairly and reasonably lead to the conclusion sought to be established, and to fairly and reasonably exclude any other hypothesis. Where the evidence is capable of an interpretation which makes it equally consistent with the absence as with the presence of a wrongful act that meaning must be ascribed to it which accords with its absence. In other words it can only be established by proof of such circumstances as are irreconcilable with any other theory than that the act was done. 'As has been said insufficient evidence is in the eye of the law no evidence.' "

In the Tibbitts case it is said:

> "The casual connection between the injury and the negligence of the defendant may be proved by direct or circumstantial evidence, but the evidence, such as it is, must be something more than consistent with the plaintiff's theory of how the accident occurred. It must be such as to make that theory reasonably probable, not simply possible."

In the Shaw case it is said:

> "If the testimony leaves either the existence of negligence of defendant, or that such negligence was the proximate cause of injury, to con-

jecture, it is insufficient to establish plaintiff's case. If the conclusion to be reached from the testimony is equally consonant with some theory inconsistent with either of the issues to be proven it does not tend to prove them, within the meaning of the rule above announced. The use of the word 'tend' does not contemplate conjecture. It contemplates that the testimony has a tendency to prove the allegations of the complaint and not some other theory inconsistent therewith."

In the Monson case it is said:

"The cuts and bruises on the face do not appear to have been mortal. The fact that they were there and that there was blood on the timber is as consistent with the idea that the deceased died a natural death as that he was killed by being caught between the cage and the timbers or by a cage or by a fall. * * * Any other conclusion upon such evidence would be a determination of the rights of the parties upon speculative and conjectural inferences, which is not permissible."

In re Wallace Estate case it is said:

"But unless this hypothesis be the only one which fairly and reasonably accords with the known circumstances of the case, as shown by the evidence, it cannot be said to be established as an inference from the proved facts. For, as we have shown, it is not sufficient that the circumstances of the case be consistent with respondent's theory. They must be inconsistent with any other reasonable theory equally deducible therefrom."

In the Albert case it is said:

"Resting on circumstantial evidence, the plaintiff's case is not sufficient merely because the circumstances proved are consistent with the plaintiff's theory; but the circumstances must show, when weighed with the evidence opposed to them, that the circumstances relied upon have more convincing force, substantiating the theory contended for, and from which theory it results that the greater probability is in favor of the party upon whom the burden rests."

In the Ohlson case it is said:

"The evidence relied upon by the appellee is wholly circumstantial, and in our judgment falls far short of the requirement of the established rule that even in a civil action, an allegation cannot be said to have been proved by circumstantial evidence, unless the facts relied upon are of such a nature and are so related to each other that it is the only conclusion that can fairly or reasonably be drawn from them. It is not sufficient that they be merely consistent with the allegation."

In the Ford case it is said:

"When inferences are thus clearly consistent, the one with liability and the other with no cause of action, the plaintiff has not met the burden which the law places upon her."

In the Spickelmier Fuel and Supply Co. case it is said:

"These decisions state the rule correctly, but it should be borne in mind that an inference to serve such purpose must be reasonable, and must be drawn from facts which the evidence tends to establish. They cannot be ar-

bitrarily drawn, but judgment must be exercised in so doing in accordance with correct and common modes of reasoning."

In the St. Louis & S. F. R. Co. case, the ninth syllabus is as follows:

> "An inference from testimonial evidence is permissible to the jury when, and only when it is a probable or natural hypothesis or explanation of such evidence, and when the other hypothesis or explanation are either less probable or natural or at least not exceedingly more probable or natural."

In the Southern Railway Company case the court quotes with approval from another case as follows:

> "Proof which goes no further than to show that an injury could have occurred in an alleged way does not warrant the conclusion that it did so occur where from the same proof the injury can with equal probability be attributed to some other cause."

We can see no escape from the conclusion, that there was nothing in this evidence, from which an inference could be drawn, that the one committing the robbery removed the tapered steel plug, nor that he learned the combination, or effected an entrance into the safe, through the drilled hole. There simply, as we view it, is nothing in the record which would reasonably lead to any such conclusion, much less meet the tests as announced in the cases cited above. Not only is this true, but the facts proven are

strong in creating an inference that the robber entered in the usual way, with the knowledge of the combination, and without disturbing the steel plug, nor resorting to the drilled hole. The verdict in the case could only be the result of guess and speculation.

There is, however, a legal barrier to this claim that by circumstantial evidence, liability under the policy has been established. It is the universal rule that an inference cannot be pyramided on inference, nor presumption on presumption. To establish a fact by circumstantial evidence, the inference must be drawn from an established fact.

A leading case on this point is United States v. Ross, 92 U. S. 281 (23 L. Ed. 707), where it is said:

> "Whenever circumstantial evidence is relied upon to prove a fact the circumstances must be proved and not themselves be presumed."

In Manning v. John Hancock Mutual Life Ins. Co., 10 Otto, 693 (25 L. Ed. 761), the court says:

> "A presumption which a jury may make is not a circumstance in proof and is not therefore a legitimate foundation for presumption. There is no open and visible connection between the fact out of which the first presumption arises and the fact sought to be established by the dependent presumption."

In Loone v. Metropolitan Railway Co., 200 U. S. 480, (50 L. Ed. 564), it is said:

> "But the negligence of the defendant cannot be inferred from the presumption of care on the part of the person killed. A presumption in the performance of duty attends the defendant as well as the person killed. It must be overcome by direct evidence. One presumption cannot be built upon another."

See also:

Smith v. Pennsylvania Railroad Co.,
239 Fed. (2nd Cir.) 103.

It was necessary, if an inference could be drawn at all, that there should be several inferences, viz., that the robber removed the steel plug, that having removed the plug, he through the drill hole manipulated the combination so as to open the door, and in that manner learned the combination; that later, without the knowledge of the combination obtained in any other manner, he opened the safe and took the money.

NO VISIBLE MARKS OF TOOLS, EXPLOSIVES, CHEMICALS OR ELECTRICITY

The theory, of Defendant in Error, must be that the visible marks, made by the robber in effecting an entrance into the safe by tools, explosives, chemicals or electricity, is the claimed fact that there was a steel plug in this drilled hole which was no longer there on September 24, 1924. There is no

suggestion of any evidence, of any other mark, of any nature, or kind, especially since the court withdrew from the jury any evidence as to the drill mark on the carrier tumbler. (Tr. 145.) Therefore, the claimed visible mark is the absence of the plug. This might be compared to the situation, which would exist, if the robbers had carried the safe away, and action then had been brought on the policy. The disappearance of the safe would be treated as the equivalent of visible marks of force and violence with tools, explosives, chemicals or electricity. It is preposterous to talk about the absence of this steel plug being a visible mark of force and violence, and still more preposterous to consider it from the standpoint of a visible mark of tools, explosives, chemicals or electricity. There is nothing visible in the way of a mark of any nature, nor is there anything visible showing the use of any tools, explosives, chemicals or electricity. The plug did not even constitute a part of the safe. It was simply the insertion of something into the hole. When it was removed, the safe was as it had been before. It was the safe and its contents, which Plaintiff in Error insured, not the tapered steel plug.

The policy provides that the statements in the declarations "are declared by the assured to be true. This policy is issued in consideration of such statements and the payment of the premium in the Declarations expressed." In the Declarations it is provided, "the safe or safes are described and desig-

nated as follows: *** (d) thickness of solid steel in outer safe door, exclusive of bolt work (d) 1-4 inches." The Insurer was accepting a certain limited liability. It was of the utmost importance that it should know the character of the safe, and the resistance which it offered against burglary. The low premium, naturally, was based upon such resistance. It was not the intention to insure a safe which could be easily entered. It might with equal propriety be contended, that if the safe offered no greater resistance than a dry goods box, then entrance to such safe would be within the protection of the policy. When the words "solid steel" are used, the language means just that. This is made manifest by the exception, "exclusive of bolt work." In other words, this outer door was to present a solid resistance to invasion of burglars to the extent of ¼" of steel in thickness, exclusive of the hole for bolt work. The theory of Defendant in Error is that this outer door did not have ¼" thickness of solid steel, due to the fact that the hole had been drilled and was filled with a tapered steel plug driven in fairly tight; that the resistance of the safe to the burglar was overcome due to this fact.

To say, therefore, that with this misrepresentation in the policy, which was most material, that the policy can be extended to cover the part of the door which was not "solid steel", is to reward the insured for the misrepresentation made. The policy did not cover the plug, the plug was not a part of a solid

steel outer door and the entrance to the safe was not effected through any part of the solid steel.

If this court should hold that the alleged removal of the steel plug would constitute a visible mark of tools, explosives, chemicals or electricity, nevertheless, Defendant in Error has itself presented the testimony showing the representation made, on which the policy was issued, and the falsity of such representation. That the representation was, as a matter of law, most material we think cannot be questioned. The outer door did not offer the resistance, which was one of the considerations for the issuance of the policy, and due to this weakness Defendant in Error is now claiming it sustained the loss claimed.

ENTRANCE EFFECTED TO SAFE BY MANIPULATION OF COMBINATION

Another reason, why judgment should be directed in favor of Plaintiff in Error, is, that irrespective of whether the one who took the money obtained knowledge of the combination, through the use of the drilled hole, the fact still remains that the entrance to the safe was effected by the manipulation of the combination lock. The robber entered in the regular way. The policy provides that the company shall not be liable if entrance was "effected by opening the door of any vault, safe or chest by the use of a key or by the manipulation of any lock."

It is of no importance, we take it, how the robber obtained knowledge of the combination whether in a proper way, or in a wrongful way. The fact remains that he had the combination and was able to open the door of the safe by the use of the combination. Somewhat similar questions have arisen where the robber has forced the one having the combination, to communicate the numbers to him, to open the safe, or in some similar manner, has forced an entrance to the safe or other place covered by the policy, without using tools or explosives, or leaving visible marks.

New Amsterdam Casualty Co. v. Iowa State Bank, 277 Fed. (8th Cir.) 713;

Franklin State Bank v. Maryland Casualty Co., 256 Fed. (5th Cir.) 356;

First Nat'l Bank of Monrovia v. Maryland Casualty Co., 28 Am. & E. Ann. Cases, 1913-C, 1176 and notes, (121 Pac. 321);

Fidelity & Deposit Co. v. Panitz, 120 Atl. (Md.) 713;

Van Kuren v. Travelers Ins. Co., 108 S. E. (Ga.) 310;

Nahigan v. Fidelity & Casualty Co., 253 S. W. (Mo.) 83;

Frankel v. Mass. Bonding & Ins. Co., 177 S. W. (Mo.) 775;

Maryland Casualty Co. v. Ballard County Bank, 120 S. W. (Ky.) 301;

Blank v. National Surety Co., 165 N. W. (Ia.) 46;

Rosenthal v. Amer. Bonding Co., 46 L. R. A. (N. S.) 561 and cases cited;

Feinstein v. Mass. Bonding & Ins. Co., 183 N. Y. Supp. 785;

United Springs Co. v. Preferred Accident Ins. Co., 161 N. Y. Supp. 309.

ANY FORCE OR VIOLENCE, OR VISIBLE MARKS MADE PRIOR TO POLICY PERIOD

Another reason is that the evidence can only lead to one conclusion, and that is that the one who robbed the safe made his preparations and plans at a time prior to the policy period. Every particle of evidence, which evidence we have discussed above, points that way and there is no evidence that any of these things were done during the policy period, except to take the money. The District Court instructed the jury in substance that, if force and violence were used, and the visible marks made, prior to the policy period, and if by using this information, the robber during the policy period entered and took the money, that the policy was liable.

It will be necessary for us to discuss this feature of the case, more at length, later in dealing with the instructions given by the court, and refusal of the court to instruct. If the District Court erred in this construction of the policy, then we think it is

manifest that, whether there is, or is not, evidence in the record, of force and violence, and whether there is or is not any evidence of visible marks, that nevertheless all these things occurred prior to the policy period, and the policy is not liable.

There is no evidence, either direct or circumstantial, that the door cut in the grandstand, the door cut in the auditor's room, the placing of the tape, the removal of the screw connecting the arm to one of the bolts, or the oiling of the bolts of the vault door, or the removal of the tapered steel plug, from the drilled hole in the safe door, by the robber, if any inference can be drawn, that it was removed by the robber, were any of them done after the commencement of the policy period, August 31, 1924, noon. All of the evidence, in the case, points to the fact that, if any of these things were done by the robber, it was at a time prior to the commencement of the policy period. There is the direct evidence of Mr. Reinhardt, that the oil on the vault mechanism, was discovered by him on the Tuesday, prior to the opening of the fair, which would be five days prior to the commencement of the policy period; (Tr. 70) the direct testimony of Mr. Corey that the dial rim had been in place for a considerable time. (Tr. 82, 90.) The nature of these things which were done, was such as to indicate that they would consume considerable time, cause considerable noise, and would most probably be discovered, if there were others in the vicinity. The character of the things done re-

quired that there should be an opportunity to work unmolested, and without fear of discovery. During the year, outside of two weeks before the fair opened, there was nobody on the fair grounds but the caretaker (Tr. 68.) Commencing with two weeks before the fair opened there were many people on the grounds day and night. (Tr. 68.)

The burden of proof was on Defendant in Error to establish its case. There was nothing in the record from which an inference could be drawn, that any of these things occurred during the policy period. All facts indicate the contrary. If, therefore, it was necessary that the force and violence, and the making of the visible marks, should be within the policy period, then no case was made warranting the submission of the case to the jury.

STEEL SHAVINGS FOUND SEPTEMBER 24, 1924

We will endeavor to give a complete statement of the evidence bearing upon the presence of these steel shavings. It is, indeed, peculiar, to say the least, that they appeared, subsequent to the time the loss of the money was discovered. Such, however, is the fact. It is not necessary that we should speculate as to the motive of the one placing them there.

We will first consider Defendant in Error's evidence which offered no explanation of these shav-

ings but which, standing alone, we think establishes that the shavings were not present on the morning of September 5. Certainly there was no attempt on the part of defendant to show that they were present at that time.

Mr. Sutherland, the auditor of the Fair Association, after testifying that $5,000 additional was left with him for business purposes on that morning (Tr. 39)—although the other evidence showed that it was not needed for that purpose (Tr. 39, 43)—on cross examination testified that when the robbery was discovered, the chief of police. finger print expert, Jordan, and several other officers were called; that the witness went into the vault and looked the safe over, and looked around inside the vault to see anything that could be discovered which would explain how the money might have been taken. "I made a pretty careful search at that time and on some subsequent occasions, from time to time, as I had leisure, I would look around in there with the idea of probably finding out some way that they might have gotten into the vault without going through the door. (Tr. 44.) The witness does not claim to have discovered any shavings.

Mr. Reinhardt, the auditor of the Fair Association, opened the vault door on the morning of September 5th, and was the first one to see inside, and was the one who caused the police to be notified. (Tr. 47.) On cross examination he testified that of

the $5,000 extra money, placed in Sutherland's hands on the morning of September 4th, very little was used. (Tr. 48.) He went in with the police. (Tr. 49.) This witness at no time gave any testimony as to having seen any steel shavings, notwithstanding he was in charge of the auditor's office. He testified: I did not look to see how entry had been effected to the safe or whether there were any marks on the safe. We had to go to work when the police were there and left them in charge. (Tr. 49.)

Mr. Semple, on direct examination, testified that for the purpose of trying to find out how the robbers got in, that on Friday morning, September 5th, he engaged the Burns Detective Agency for the purpose of finding out "how this was done." We already had one of the Burns people out there working for us, and they assigned others immediately to work on the thing, who were there with the police officers and city detectives. They made an investigation here and in other places so far as we thought was necessary. (Tr. 25.) This witness was present when the drilled hole was discovered on September 24th, and then noticed the steel shavings. (Tr. 58.) On cross examination this witness testified: "I first knew of the shavings on the same evening, September 24th. (Tr. 59.) At that time, on September 5th, I investigated and examined for the purpose of discovering any kind of a clue as to how the entrance could have been effected, and this was being generally done by the fair officials, the police officers, the

employes of the Fair and others, and there were several police officers from the detective force of the city of Spokane out there looking things over that day, and they spent practically the entire day of the 5th going over that situation. * * * On the morning of September 5th, when the loss was discovered, Chief Turner, Officer Jordan, the finger-print man from the police station, and two or three others, officials from the detective force of Spokane, were there. * * * I saw some of these officers going over the interior of this vault, over the walls and flooring and ceiling; that was all gone over. I did not see any of them using a magnifying glass. I know they made an examination for finger prints. * * * From the morning of the 5th to the evening of September 24th there was lots of officers around these platforms and the Fair Association had on the premises some private detectives. * * * I did not see these steel shavings which I have referred to before Corey had taken out the combination and had discovered this hole, and did not know of their presence before then. I had not seen them, so far as I know, between the morning of the 5th of September and the afternoon of September 24. I had heard nothing of the presence of shavings during that time." (Tr. 60-61.)

C. L. Corey, the safe expert, on direct examination, testified that he was the safe expert who was taken out by the Fair Association to again examine the safe on September 24th (Tr. 81) and saw the steel shavings at that time. (Tr. 82.) On cross

examination he testified: "I don't know where these shavings came from unless they came from the second drilling. I don't know but what may be some one put them there. They covered a space of a couple of feet may be." (Tr. 89.) Mr. Corey had been out previously after the robbery had been discovered, a time or two, but does not claim to have seen any shavings until September 24. (Tr. 81.) "I had made an examination of the premises on Sunday following the close of the fair." (Tr. 89.)

On Plaintiff in Error's case the following testimony was introduced, and none of it was impeached or contradicted in any manner.

Chief of Police Turner testified that on the morning of September 5th, he visited the Fair Grounds with other police officers and with the finger-print expert; that he spent most of the day out there and on subsequent days went out and made investigation. That the witness had specialized in the identification branch of police work; that he went into the vault and assisted Jordan in making his investigation. "I looked the safe over and examined several articles with the magnifying glass with a view of finding finger prints. I was looking at a small iron roller. I don't know whether it would be a ticket roller or just what the purpose of it was. Jordan has it here." The witness further testified when he so examined this iron roller under a magnifying glass there were no steel shavings on it. (Tr.

104-105.) That on the afternoon of September 24 he again examined it and there were a number of steel shavings (Tr. 106); that on September 5th he checked up a number of articles from under the safe and examined them, and if there had been any steel shavings on the stand on which the safe was resting that he thought they would have attracted his attention. That he did not discover any shavings on that, or on any of the subsequent days, until September 24th. That on the afternoon of September 24th he noticed them immediately as soon as he got into the vault room and they were very noticeable. He was standing several feet away when he noticed them. (Tr. 106-107.)

Officer Jordan testified that he had specialized in finger print work; that he made an examination inside the vault on the morning of September 5th and on other occasions; that he examined the safe to see whether any force had been used in opening it and examined the ticket holder. That this ticket holder, on the morning of September 5th, was on the stand upon which the safe rested, under the front part of the safe; that he picked the ticket holder up and examined it and put it back where he had found it, and it was still there on September 24th; that he made a careful examination of this ticket roller under a magnifying glass and did not discover the presence of any steel shavings. That he looked over the platform and the different articles there and discovered no steel shavings. (Tr. 114-116.) That

after the drilled hole was discovered the prosecuting attorney delivered this roller to the witness and there were then steel shavings on same and they could be easily seen. (Tr. 119.)

Officer Thompson, on the Sunday following the robbery, was detailed on the case. He was in the vault and went over everything inside carefully. He did not see any steel shavings but testified "If there had been steel shavings there at that time I couldn't help but see them." (Tr. 120-121.)

Officer Aikman was detailed on the case on the morning of September 5th. With Officer Alderson he inspected the interior of the vault and looked over the safe particularly and saw no steel shavings. (Tr. 124-125.)

Officer Hudson, on the Sunday following the robbery, was detailed on the case. He went over everything inside the vault with the greatest of thoroughness. "The safe was supposed to have been examined by several men. "Yes, I looked it over. I looked under and tested the bottom of it. I made a complete examination of all that I could see about the safe and what was under it. I moved everything that was around the safe away from the corner—I moved everything that was movable and moved it back. I had to take a light for the examination. With that light I could see everything that was to be seen. I don't remember seeing Exhibit 23 in there. I saw no steel shavings under or about the

safe. I think, with the examination I made, I would have seen them if they had been there. There were none there that I saw." (Tr. 127-128.) This officer remained on the case about five weeks and devoted no time to any other work. He was at the fair ground on the afternoon of September 24th when the steel shavings were discovered. He noticed them immediately, when he went into the vault room, without anyone directing his attention to them, and was then standing several feet away. (Tr. 128.) There was no difficulty in seeing the shavings and the witness picked up about a half teaspoonful of them. There were then on the platform two scale weights and in the notch of these weights was a small amount of brass shavings (Tr. 129). That when the witness made the examination on September 7th these weights were not in that position or place nor was the brass there at that time. (Tr. 130.) On September 7th these weights were either on top of the safe or on one of the shelves. They were used by the witness to hammer the walls with in making his tests. (Tr. 131.)

Officer Keenan testified that he started to work on the case on the Monday following the robbery. That he entered the vault, looked it over, looked around the stand or bench, around the top of the bench. "I did not see any steel shavings." (Tr. 132.) On the morning of the 25th of September the shavings were easily noticeable. (Tr. 133.)

Officer Self testified that he was one of the first to reach the auditor's office after the robbery. He inspected the interior of the vault and saw the ticket tray. He saw Officers Jordan and Hunt handle it. While this witness was in the vault he had a flashlight and was using it in making his examination. (Tr. 134.) "I looked in the safe, in the pigeon holes around the face of the safe and all around it." That he saw everything that was in the vault and safe (Tr. 135) and did not see any shavings. (Tr. 136.)

J. W. Bolt, another lock expert, was called by the Fair Association to examine inside of the vault and the safe, and between September 5th and September 24th changed the combination of the safe. He did not see any steel shavings. After September 24th he did see them and they were easy to be seen. (Tr. 136-137.)

Denfendant in Error may, in its brief, refer to the fact that Corey, the safe expert, testified that when he pulled off the dial rim on September 24th, some shavings fell out. (Tr. 82.) This statement, however, seems to be inconsistent with the witness' testimony at another place that the shavings were first discovered by Officer Hudson (Tr. 89) who came out to the fair grounds on the afternoon of September 24th after the drilled hole was discovered and the combination dial and dial rim had been taken off. Officer Hudson (Tr. 130) and Chief of Police Turner (Tr. 107) both testified that they were

the ones who first discovered these steel shavings. Mr. Corey testified further, "I had not discovered them—I had not looked for them." (Tr. 89.) Therefore we say, this testimony of Mr. Corey is quite inconsistent. Nevertheless, if there were any steel shavings at that time under the dial rim, it leaves the situation worse for Defendant in Error. According to Mr. Corey these steel shavings under the dial rim may have been placed there by some one, "maybe someone put them there." (Tr. 89.) It is certain, however, that they were not there as the result of the robber having drilled into the steel plug. The robber could not have drilled into the steel plug without ruining the dial rim (Tr. 89, 95.) The shavings made by such a drilling, if they were held by any dial rim, it would be by the ruined one which would have to be replaced. The dial rim on the safe at the time these shavings were discovered had not been damaged (Tr. 90.) Defendant in Error then sought to establish that there might have been a few shavings that remained in the hole after the plug was removed. Defendant in Error overlooks the fact that according to the evidence of Corey the plug was not drilled out (Tr. 87, 88) and the only possible theory was that it might have been drilled into with a smaller drill and then pulled out (Tr. 88). This method, however, would prevent any shavings ever getting into the hole. They simply would never be in the hole at all. All shavings from such a drilling would necessarily fall on the outside. This was con-

ceded by Mr. Corey where, on cross examination, he testified:

> "I know that that dial rim was not and could not be in place on that safe at the time that drill hole was made, or if there was a plug there at that time the plug was put in. There is a very easy explanation as to how the shavings got in the dial rim which is, there is a certain amount of shavings that are left in the hole after you drill it and after the dial rim is put on on the slamming of the door back and forth would cause the shavings to drop out from in front down into the dial rim. These shavings would rest down in the edge of the rim—the ones which might be jarred back into the dial rim by the slamming of the door would be inside of the hole. If that hole was drilled by Mr. Larson in 1922 and a plug was put in there there couldn't be any shavings and if the plug was put in there and driven out from the inside there couldn't be any shavings there, and if a smaller hole was used to bore into the plug and they in that way extracted the plug, well there may have been some shavings in behind the plug. They would have to be very far in. The plug, as a usual thing, is only a short one." (Tr. 92-93.)

Pertinent to the above quotation from Corey's testimony, is what this Court can see by an examination of this drilled hole. The hole is drilled on a considerable downward slant, being lower on the inside than at the outside of the door. The theory, therefore, of a few steel shavings being on the inside of the hole and jarring out, is, as can be easily seen, an impossibility. However, the witness' evidence quoted above concedes this.

ERRORS BASED ON CONSTRUCTION OF POLICY BY DISTRICT COURT

Specifications 4, 6, 7, 8, 9 *and* 10.

II.

Some of these specifications will be discussed in a later part of this brief, but under this heading we will discuss them only from the standpoint of what Plaintiff in Error considers was an erroneous construction of the policy. The error committed, if the construction was wrong, was of the most substantial character. As we have shown above, if an inference could be drawn from the evidence introduced, that this plugged hole played any part in the loss of the money, all of the evidence tended to prove that the hole was used, if at all, for the purpose of obtaining the combination, prior to the policy period, noon, August 31, 1924. The question is, therefore, squarely raised by the instructions requested and refused, and the instructions given, as to whether force and violence used, and visible marks made, prior to the policy period can be considered for the purpose of establishing a liability. The material parts of the policy bearing upon this question are the following:

> "I. To indemnify the Assured for all loss by burglary * * * by any person or persons making felonious entry into such safe or vault by actual force or violence, of which force and violence there shall be visible marks upon said safe

or vault by tools, explosives, chemicals or electricity.

IV. This agreement shall apply only to loss or damage, *as aforesaid,* occurring within the policy period. * * *

C. The company shall not be liable * * * nor if effected by opening the door of any vault, safe or chest by the use of a key or by the manipulation of any lock."

Item IV of the Declarations provides that the policy period "shall be from August 31, 1924, to Septmeber 10, 1924 at 12 o'clock noon." We will not attempt to state the theory of the District Judge in giving the policy a construction, which permits a recovery, if the only force and violence occurred, and the only visible marks were made, prior to the policy period, and which also permits a recovery where the entry was made during the policy period by the use of no force or violence, and without making visible marks of such entry, and the only means used during the policy period of effecting the entrance was the manipulation of the combination lock. As we read the policy no such construction is possible.

The manifest intention of the insurer and insured when this policy was written and delivered, was to effect insurance for a period of but ten days. A premium was paid for but that period. It is unthinkable that the insurer could be held liable except during that period. The insurance, to be effective during the policy period, was to be of a certain char-

acter, and no other. It was insurance against burglary, where the property was taken from a certain specified place, by a person making felonous entry into such place, by actual force and violence, and who left a certain character of visible marks upon the safe of such entry. The burglary mentioned would not be of the character covered by the policy, unless all of the said elements were present. A certain kind of burglary only was insured against. That this is true is made further certain in paragraph IV, where it is provided that the policy "shall apply only to loss or damage *as aforesaid*," The word "loss" in this paragraph relates to the preceding paragraph No. I, while the word "damage" relates to the preceding paragraph No. II. By this paragraph IV, it is thus expressly provided that the policy relates only to a loss "*as aforesaid*," referring back to the limitations contained in paragraph I, and it must have occurred "within the policy period". We cannot conceive how there could be any possible foundation for a claim that there is here anything that is ambiguous. The construction adopted by the District Court violates the manifest intention of the parties. It could not have been in the mind of the insured that things occurring outside of the policy period might be considered for the purpose of creating a liability. It must have been in the contemplation of both parties that the conditions, necessary to create a liability, should occur within that period, It could not have been in the contemplation of either party, that the premium paid for the limit-

ed period, should entitle the assured to rights on account of things done outside of that period. While Defendant in Error in this action has not sought to recover damages under paragraph II above, for damages to the safe, yet it would have been just as reasonable for it to have made that claim, if the safe was in fact damaged, before the policy period, by the withdrawal of the tapered steel plug, as it would be to claim a recovery for the money abstracted from the safe, where the plug was withdrawn prior to the policy period.

An insurance contract is not construed, or enforced, any differently from any other contract, executed under like conditions. An insurer is not considered less favorbly, by the courts, than any other contracting party, nor is an insured considered more favorably. It is the rule that any ambiguity, in an insurance contract, is construed favorably to the insured, but this is not because the insured is treated as a favorite of the law. The reason for such rule is, that insurance policies are prepared by the insurer, and often the language is considerably involved and the insured has no voice in the preparation of the policy. The foundation of the rule for the construction of insurance policies is based upon the rule applicable to other contracts, viz., that in case of ambiguity, they will be construed against the one who prepared the contract. It is, however, only where there is an ambiguity that such rule is applied.

It is not applied for the purpose of punishing one, or rewarding the other, party to the contract.

FUNCTION OF COURT. In construing a contract of insurance made by parties competent to contract, it is the duty of the court to follow the law and confine itself to a determination of the meaning of the language employed, or, in other words, to a determination of what the contract is; in the absence of waiver, ambiguity, illegality, fraud, mutual mistake, or some phase of equitable jurisdiction, and in the absence of a statute requiring a construction or effect other than that intended by the parties, it is the function of the court to construe and enforce the contract as it is written and not attempt to make a new contract for the parties, nor, by implication of construction, add to the contract words, terms, conditions, exceptions, promises or obligations which it does not contain. Indeed, it is only when the contract is ambiguous that the court can resort to construction; where the language employed is clear and definite there is no occasion for construction or the exercise of a choice of interpretations. The court should lean to a construction which makes the contract definite and certain rather than to a construction which leaves a question which must be submitted to a court for determination in substantially every case."

32 C. J. p. 1148 Sec. 258, and cases cited.

See also:

9 C. J. 1096.

"A court of law can do nothing but enforce the contract as the parties have made it. The legal rule that in courts of law the written con-

tract shall be regarded as the sole repository of the intention of the parties and that its terms cannot be changed by parol testimony is of the utmost importance in the trial of jury cases and can never be departed from without risk of disastrous consequences to the rights of the parties."

Northern Assurance Co. v. Grand View Bldg. Ass'n., 183 U. S. 308, 332 (46 L. Ed. 213).

"The rule is well settled that: 'where a written contract is susceptible on its face of a plain and unequivocal interpretation resort cannot be had to evidence of custom or usage to explain its language or qualify its meaning. *Hunt v. Fidelity & C. Co.*, 99 Fed., 242, 245; 39 C. C. A. 496.' Having satisfied ourselves that the policy is susceptible of a reasonable construction on its face without the necessity of resorting to extrinsic aid, we have at the same time established that usage or custom cannot be resorted to for that purpose. *The Insurance Co. v. Wright*, 1 Wall, 456, 470, 17 L. Ed. 505."

Kentucky Vermillion L. & C. Co. v. Norwich U. F. Ins. Soc., 146 Fed. (9th Cir.) 695.

"The argument there made by the attorney for the Drainage District is repeated in his brief; that is, the defendant in error being a compensated surety would not be released from the bond except to the extent of the damage sustained by reason of the increased cost resulting from the additional requirement made upon the contractor. The bond is a contract between the parties. The enforcement of the express terms of the contract of suretyship cannot be made to depend upon whether the surety is compen-

sated or not. It cannot be one contract when the surety is compensated and another contract when the surety is not compensated."

Bench Canal Drainage District v. Maryland Casualty Co., 278 Fed. (8th Cir.) 67, 80.

"It is urged that the principle of construction which should be applied to the policy is that: 'Words of exception of limitation of liability in an insurance policy are to be strictly construed against the insurer and forfeiture avoided if possible' * * * we think the law is in substance correctly stated by counsel, yet we must add that if the language used by the parties has a plain meaning and is not inconsistent with other clauses or provisions of the contract, effect must be given to it. The court cannot ignore express stipulations in order to obviate a hardship. * * * It is right to infer that the quality of insurance had its counterpoise in the price paid for it."

Gilchrist Transp. Co. v. Phoenix Insurance Co., 170 Fed. (6th Cir.) 279, 281.

In Frankel v. Massachusetts Bonding & Insurance Company, 177 S. W. (Mo.) 775, somewhat similar questions were involved as in the case at bar.

The Court says:

"In the next place, while it is true that insurance policies are to be construed in favor of the insured and against the company, yet this is only permissible where there is room for construction. Such rule does not permit courts to remake policies, or to change the face of their

plain and explicit terms. The rule above mentioned is applied where the insurance contract contains clauses of doubtful, ambiguous or conflicting meaning."

The case of Rosenthal v. American Bonding Company, 46 L. R. A. (N. S.) 561, deals with quite similar questions to those involved here. In the notes are cited all the cases up to that date, involving burglary policies. It was urged that because the evidence clearly established that a burglary had been committed, that the provision of the policy requiring visible marks of force and violence was no longer material. It is said:

"Doubtless the justice of the provision would be a subject for disagreement between the parties to the contract. Quite possibly the interpretation which had been outlined might prevent recovery on bona fide losses. On the other hand, quite commonly an entrance into a building for burglarious purposes, which was accompanied by 'actual force and violence' would not be made during business hours by opening an unlocked door, but would be effected by methods which would leave marks upon the premises which would be quite respectable evidence that a burglary had been committed within the indemnity policy. But these considerations, on one side or the other, are not before us in this case. If the parties to a contract adopt a provision which contravenes no principle of public policy, and contains no element of ambiguity, the courts have no right to relieve one of them from disadvantageous terms, which he has actually made. * * * But if the contract is not of uncertain meaning, as has often been said, the

courts may not make a new one under the guise of construction."

In Hartford Fire Insurance Co. v. Wimbish, 78 S. E. (Ga.) 265, the action was to recover for damages to an automobile, occasioned by theft, robbery or pilferage. It is said:

> "And we know of no authority for giving any different meaning to these words in a contract of insurance, wherein it is stipulated that the company would be liable for loss or damage to an automobile resulting from theft, robbery, or pilferage."

In Stich v. Fidelity & Deposit Co., 159 N. Y. Sup. 712, it is said:

> "Where the evidence is entirely consistent with the loss by negligence of the party insured, or by the innocence of a third party, the plaintiff has obviously failed to prove a loss by felonous abstraction."

A case having some bearing is that of Stuht v. Maryland Motor Car Ins. Co., 90 Wash. 576 (156 Pac. 557.)

A very interesting case arising on a burglary policy and having some bearing on this case is that of the Bank of Monrovia v. Maryland Casualty Co., 28 Am. Eng. Ann. Cases, 1913-C, page 1176 and notes.

In Blank v. National Surety Co., 165 N. W. (Ia.) 46, the burglary policy was similar to the one

here involved. The rule is stated that while in case of ambiguity the policy would be construed most favorably to the insured, that, nevertheless, if there was no ambiguity a strained construction would not be adopted for the purpose of creating a liability. It is further held that visible marks made upon the building in effecting an entrance would not bring the case within the policy requiring visible marks of force and violence.

III.

Specifications 3 *and* 4.

These specifications relates to Plaintiff in Error's requested instruction 4. The policy provides specifically that it does not protect against "opening the door on any vault, safe or chest, by the use of a key or by the manipulation of any lock." This provision of the policy was plead as, and relied upon, as an affirmative defense. The testimony clearly established this affirmative defense, as shown by the references above. The District Court refused this requested instruction, but did give another instruction relating to entrance being effected by "manipulating the combination." (Tr. 146.) The instruction as given was qualified by the previous instructions, which were given, to the effect that, if knowledge of the combination had been gained by force or violence at any time, the loss would be within the protection of the policy.

It is our contention that, irrespective of how the knowledge of the combination was obtained, whether with, or without force, or violence, nevertheless, there would be no liability, if the door was opened solely through manipulation of the combination lock. Still, for a greater reason, if the force and violence used for the purpose of obtaining the combination, was prior to the policy period, the defense, that entrance was made by manipulating the combination lock, would be good.

For another reason, this instruction given by the Court does not cure the failure to give requested instruction 3. It will be noted that in the instructions so given, the jury is told, that, the affirmative defense, of entry being made by "manipulating the combination," would only be good, if entrance to the safe was effected without employment of actual force or violence. Force and violence alone would not destroy this affirmative defense. The provision of the policy is, there should only be a liability, where the entry was "felonous," and where there were "visible marks" made upon such safe or vault by tools, explosives, chemicals or electricity, evidencing such force and violence. The instruction given by the Court denied the defense, if there was actual "force or violence" used in making the entry. This "force and violence" might have been the entry through the grandstand, the partition to the Auditor's room, the vault door, intimidation of someone,

the wrenching of a knob on the safe door, or other similar acts.

IV.

Specification 5.

This specification relates to requested instruction 6. In substance, this requested instruction was, that no recovery could be had unless the tapered steel plug, in the safe door, was removed by the alleged burglar or burglars. The requested instruction was refused, and there was no similar instruction given. We submit that the error is manifest and was most prejudicial.

There was no evidence before the jury, or claimed evidence, that there was any force or violence, or visible marks, which would bring the case within the protection of the policy, except it was originally claimed, there was such evidence due to drilled hole, and later, apparently, on account of the removal of steel plug.

If the Court should conclude, that there was a legal basis for an inference, that, the plug was removed by the one robbing the safe, and by the removal of such plug the robber learned the combination, still there could be no foundation for the action, unless such robber did in fact remove the steel plug. Plaintiff in Error was therefore entitled to a positive instruction, that unless the jury should find that the

plug was removed by the robber, no recovery, could be awarded Defendant in Error.

V.

Specifications 11 *and* 12.

These specifications relate to the overruling of Plaintiff in Error's, petition for a new trial, and in entering judgment. Under these specifications there is nothing further to add than has already been discussed above.

We respectfully submit, that, there was no evidence introduced from which an inference could legally be drawn, which would sustain a liability in this case; that, even if there was any evidence, which would sustain an inference, that, the robber removed the steel plug, and by so doing learned the combination, nevertheless, there were no visible marks on the safe, of tools, explosives, chemicals, or electricity; the evidence conclusively establishes, that, the entrance was effected by the manipulation of the combination lock; that even if there was any force, or violence, or visible marks, they all antedated the policy period. That in any event, the construction of the policy by the District Judge was erroneous, and prejudicial error was committed in other respects as above suggested.

We submit that the judgment of the lower court should be reversed and judgment ordered in favor of Plaintiff in Error.

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